

212526 D:0#010 4111500400  
ORIGINAL

LAW OFFICE  
THOMAS F. McFARLAND, PC.  
208 SOUTH LASALLE STREET - SUITE 1890  
CHICAGO, ILLINOIS 60604-1112  
TELEPHONE (312) 236-0204  
FAX (312) 201-9695  
mcfarland@aol.com

THOMAS F. McFARLAND



November 10, 2004

By UPS overnight mail

Vernon A. Williams, Secretary  
Surface Transportation Board  
Case Control Unit, Suite 713  
1925 K Street, N.W.  
Washington, DC 20423-0001

Re: Docket No. NOR-42089

815  
**FILED**  
NOV 12 2004  
SURFACE  
TRANSPORTATION BOARD

Dear Mr. Williams:

Enclosed please find an original and 2 copies of Complaint To Commence Arbitration Under 49 C.F.R. Part 1108.7(a), for filing with the Board in the above referenced matter.

Also enclosed is a check in the amount of \$75.00 for the filing fee.

Very truly yours,

*Tom McFarland*

Thomas F. McFarland  
Attorney for Complainant

TMcF:kl:enc:wp8.0\1063\ltrstb1

ENTERED  
Office of Proceedings

NOV 12 2004

Part of  
Public Record

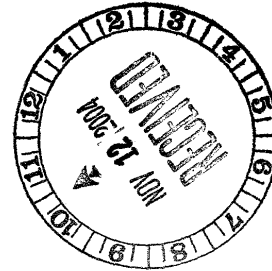
**FEE RECEIVED**

NOV 12 2004

SURFACE  
TRANSPORTATION BOARD

212526

BEFORE THE  
SURFACE TRANSPORTATION BOARD



ALBANY & EASTERN RAILROAD  
COMPANY,

Complainant,

v.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. NOR-42089

**FILED**  
NOV 12 2004  
SURFACE  
TRANSPORTATION BOARD

COMPLAINT TO COMMENCE ARBITRATION  
UNDER 49 C.F.R. PART 1108.7(a)

ALBANY & EASTERN RAILROAD COMPANY  
MIKE ROOT, President  
1784 South Main Street  
Lebanon, OR 97355  
(541) 259-6470

Complainant

ENTERED  
Office of Proceedings

NOV 12 2004

Part of  
Public Record

THOMAS F. McFARLAND  
THOMAS F. McFARLAND, P.C.  
208 South LaSalle Street, Suite 1890  
Chicago, IL 60604-1112  
(312) 236-0204

Attorney for Complainant

DATE FILED: November 11, 2004

**FEE RECEIVED**

NOV 12 2004

SURFACE  
TRANSPORTATION BOARD

Defendant.

It is provided in Section IV(4)(b) of the Railroad Industry Agreement (RIA) between specified Large Railroads and specified Small Railroads, signed on September 10, 1998, as follows:

b) Heavy Axle Loads: With the growth of heavy axle load rolling stock (286,000 lbs. or greater), the Large Railroads agree to proportionately increase the Small Railroad share of the increase, if any, in overall revenue for handling heavy axle loads to reflect tonnage in situations where traffic is priced on a per-car basis for the Small Railroad.

Both BNSF and AERC are parties to the RIA.

AERC has handled numerous heavy axle loads in interchange with BNSF, for which BNSF received increased overall revenue reflecting increased tonnage, but for which AERC received the same per car share of revenue as it receives for handling other than heavy axle loads.

BNSF has failed to proportionately increase AERC's share of the increased overall revenue received by BNSF for handling heavy axle loads reflecting increased tonnage, despite BNSF's agreement to do so in Section IV(4)(b) of the RIA.

AERC has specifically requested that BNSF abide by Section IV(4)(b) of the RIA in regard to heavy axle loads being interchanged between BNSF and AERC, but BNSF has failed and refused to do so.

AERC is continuing to attempt to prevail upon BNSF to voluntarily abide by Section IV(4)(b) of the RIA. AERC is instituting this arbitration proceeding at this time because under Section V of the RIA, all relief available to a party under the RIA shall be prospective only. Section V provides that relief granted by an arbitrator shall be limited solely to the period commencing on or, at the arbitrator's discretion, after the date that the subject arbitration proceeding was initiated. Thus, AERC would forego increased revenue shares under Section IV(4)(b) of the RIA by refraining from instituting this arbitration proceeding while seeking relief informally.

**2. Statutory Basis of STB Jurisdiction**

The dispute is within the Board's jurisdiction under 49 U.S.C. § 10705(a)(1) pursuant to which the Board may prescribe the division of joint rates for a rail carrier providing transportation subject to the Board's jurisdiction.

**3. Statement Of Issues As To Which Arbitration Is Sought**

Arbitration will be sought of the following issues:

- (a) whether BNSF and AERC are parties to the RIA.
- (b) whether AERC is handling heavy axle loads (286,000 lbs. or greater) in interchange with BNSF, for which BNSF is receiving increased overall revenue reflecting increased tonnage, but for which AERC is receiving the same per car share of revenue as it receives for handling other than heavy axle loads.
- (c) whether, by virtue of Section IV(4)(b) of the RIA, BNSF is required to proportionately increase AERC's share of the increased overall revenue received by BNSF for handling the heavy axle loads identified in subparagraph (b) above.
- (d) if the issue in subparagraph (c) above were to be resolved in the affirmative, what is the total amount of proportionately increased revenues due and owing from BNSF to AERC on heavy axle loads handled between the date of initiation of the arbitration and the date of the Arbitrator's decision.

**4. Relief Sought**

AERC will ask the Arbitrator to rule that by virtue of Section IV(4)(b) of the RIA, BNSF is required to proportionately increase AERC's share of the increased overall revenue received by

BNSF for handling the heavy axle loads identified in subparagraph 3(b) above on and after the date of initiation of this arbitration.

**5. Verification**

The verification of Mike Root, President of AERC, is attached to this Complaint as Appendix 1.

**6. AERC's Willingness to Arbitrate And Be Bound**

AERC hereby certifies its willingness to arbitrate the matter raised in this Complaint pursuant to the arbitration rules in 49 C.F.R. Part 1108, and to be bound by the result thereof in accordance with those rules.

**7. Demand That BNSF Arbitrate And Be Bound**

AERC hereby demands that in accordance with the RIA, BNSF likewise agree to arbitrate the matter raised in the Complaint, and agree to be bound by the result of the arbitration.

**8. Copy of Regulations**

A copy of 49 C.F.R. Part 1108 is attached to this Complaint as Appendix 2, as required by 49 C.F.R. § 1108.7(b).

**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, the Board should accept this Complaint for filing and institute an arbitration proceeding in accordance with the rules at 49 C.F.R. Part 1108.

Respectfully submitted,

ALBANY & EASTERN RAILROAD COMPANY  
MIKE ROOT, President  
1784 South Main Street  
Lebanon, OR 97355  
(541) 259-6470

Complainant

*Thomas F. McFarland*

THOMAS F. McFARLAND  
THOMAS F. McFARLAND, P.C.  
208 South LaSalle Street, Suite 1890  
Chicago, IL 60604-1112  
(312) 236-0204

Attorney for Complainant

DATE FILED: November 11, 2004

**VERIFICATION**

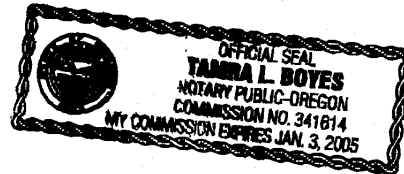
STATE OF OREGON       )  
                                  ) SS:  
COUNTY OF LINN       )

MIKE ROOT, being duly sworn on oath, deposes and states that he has read the foregoing statement, that he knows the contents thereof, and that the facts therein stated are true and correct.

Mike Root  
MIKE ROOT

SUBSCRIBED AND SWORN to  
before me this 9<sup>th</sup> day  
of November, 2004.

Tamra L. Boyes  
Notary Public



My Commission Expires:  
January 3, 2005



## Surface Transportation Board, DOT

Pt. 1108

of the application or other request for authority.

**§ 1106.3 Actions for which Safety Integration Plan is required.**

A SIP shall be filed by any applicant requesting authority to undertake a transaction as defined under § 1106.2 of this part.

**§ 1106.4 The Safety Integration Plan process.**

(a) Each applicant in a transaction subject to this part shall file a proposed SIP in accordance with the informational requirements prescribed at 49 CFR part 244, or other FRA guidelines or requirements regarding the contents of a SIP, with SEA and FRA no later than 60 days from the date the application is filed with the Board.

(b) The proposed SIP shall be made part of the environmental record in the Board proceeding and dealt with in the ongoing environmental review process under 49 CFR part 1105. The procedures governing the process shall be as follows:

(1) In accordance with 49 CFR 244.17, FRA will provide its findings and conclusions on the adequacy of the proposed SIP (i.e., assess whether the proposed SIP establishes a process that provides a reasonable assurance of safety in executing the proposed transaction) to SEA at a date sufficiently in advance of the Board's issuance of its draft environmental documentation in the case to permit incorporation in the draft environmental document.

(2) The draft environmental documentation shall incorporate the proposed SIP, any revisions or modifications to it based on further consultations with FRA, and FRA's written comments regarding the SIP. The public may review and comment on the draft environmental documentation within the time limits prescribed by SEA.

(3) SEA will independently review each proposed SIP. In its final environmental documentation, SEA will address written comments on the proposed SIP received during the time established for submitting comments on the draft environmental documentation. The Board then will consider the full environmental record, including

the information concerning the SIP, in arriving at its decision in the case.

(4) If the Board approves the transaction and adopts the SIP, it will require compliance with the SIP as a condition to its approval. Each applicant involved in the transaction then shall coordinate with FRA in implementing the approved SIP, including any amendments thereto. FRA has provided in its rules at 49 CFR 244.17(g) for submitting information to the Board during implementation of an approved transaction that will assist the Board in exercising its continuing jurisdiction over the transaction. FRA also has agreed to advise the Board when, in its view, the integration of the applicants' operations has been safely completed.

(c) If a SIP is required in transactions that would not be subject to environmental review under the Board's environmental rules at 49 CFR part 1105, the Board will develop appropriate case-specific SIP procedures based on the facts and circumstances presented.

**§ 1106.5 Waiver.**

The SIP requirements established by this part may be waived or modified by the Board where a railroad shows that relief is warranted or appropriate.

**§ 1106.6 Reservation of Jurisdiction.**

The Board reserves the right to require a SIP in cases other than those enumerated in this part or to adopt modified SIP requirements in individual cases, if it concludes that doing so is necessary in its proper consideration of the application or other request for authority.

**PART 1107 [RESERVED]**

**PART 1108—ARBITRATION OF CERTAIN DISPUTES SUBJECT TO THE STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION BOARD**

**Sec.**

- 1108.1 Definitions.
- 1108.2 Statement of purpose, organization, and jurisdiction.
- 1108.3 Matters subject to arbitration.
- 1108.4 Relief.
- 1108.5 Fees and costs.

## §1108.1

- 1108.6 Arbitrators.
- 1108.7 Arbitration commencement procedures.
- 1108.8 Arbitration procedures.
- 1108.9 Decisions.
- 1108.10 Precedent.
- 1108.11 Enforcement and appeals.
- 1108.12 Additional matters.

AUTHORITY: 49 U.S.C. 721(a).

SOURCE: 62 FR 46217, Sept. 2, 1997, unless otherwise noted.

## §1108.1 Definitions.

(a) *Arbitrator* means an arbitrator appointed pursuant to these provisions.

(b) *ICC* means the Interstate Commerce Commission.

(c) *Interstate Commerce Act* means the Interstate Commerce Act as amended from time to time, including the amendments made by the ICC Termination Act of 1995.

(d) *RSTAC* means the Rail-Shipper Transportation Advisory Council established pursuant to 49 U.S.C. 726.

(e) *STB* means the Surface Transportation Board.

(f) *Statutory jurisdiction* means the jurisdiction conferred on the STB by the Interstate Commerce Act, including jurisdiction over rail transportation or services that have been exempted from regulation.

## §1108.2 Statement of purpose, organization, and jurisdiction.

(a) These provisions are intended to provide a means for the binding, voluntary arbitration of certain disputes subject to the statutory jurisdiction of the STB, either between two or more railroads subject to the jurisdiction of the STB or between any such railroad and any other person.

(b) These procedures shall not be available to obtain the grant, denial, stay or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage rights, merger, pooling) or exemption, or to prescribe for the future any conduct, rules, or results of general, industry-wide applicability. Nor are they available for arbitration that is conducted pursuant to labor protective conditions. These procedures are intended for the resolution of specific disputes between specific parties involving the payment of money or involving rates or practices related to rail transpor-

tation or service subject to the statutory jurisdiction of the STB.

(c) The alternative means of dispute resolution provided for herein are established pursuant to the authority of the STB to take such actions as are necessary and appropriate to fulfill its jurisdictional mandate and not pursuant to the Administrative Dispute Resolution Act, 5 U.S.C. 571 *et seq.*

(d) On January 1, 1996, the STB replaced the ICC. For purposes of these procedures, it is immaterial whether an exemption from regulation was granted by the ICC or the STB.

## §1108.3 Matters subject to arbitration.

(a) Any controversy between two or more parties, subject to resolution by the STB, and subject to the limitations in §1108.2 hereof, may be processed pursuant to the provisions of this part 1108, if all necessary parties voluntarily subject themselves to arbitration under these provisions after notice as provided herein.

(b) Arbitration under these provisions is limited to matters over which the STB has statutory jurisdiction and may include disputes arising in connection with jurisdictional transportation, including service being conducted pursuant to an exemption. An Arbitrator should decline to accept, or to render a decision regarding, any dispute that exceeds the STB's statutory jurisdiction. Such Arbitrator may resolve any dispute properly before him/her in the manner and to the extent provided herein, but only to the extent of and within the limits of the STB's statutory jurisdiction. In so resolving any such dispute, the Arbitrator will not be bound by any procedural rules or regulations adopted by the STB for the resolution of similar disputes, except as specifically provided in this part 1108; provided, however, that the Arbitrator will be guided by the Interstate Commerce Act and by STB and ICC precedent.

## §1108.4 Relief.

(a) Subject to specification in the complaint, as provided in §1108.7 herein, an Arbitrator may grant the following types of relief:

(1) Monetary damages, to the extent available under the Interstate Commerce Act, with interest at a reasonable rate to be specified by the Arbitrator.

(2) Specific performance of statutory obligations (including the prescription of reasonable rates), but for a period not to exceed 3 years from the effective date of the Arbitrator's award.

(b) A party may petition an Arbitrator to modify or vacate an arbitral award in effect that directs future specific performance, based on materially changed circumstances or the criteria for vacation of an award contained in 9 U.S.C. 10.

(1) A petition to modify or vacate an award in effect should be filed with the STB. The petition will be assigned to the Arbitrator that rendered the award unless that Arbitrator is unavailable, in which event the matter will be assigned to another Arbitrator.

(2) Any such award shall continue in effect pending disposition of the request to modify or vacate. Any such request shall be handled as expeditiously as practicable with due regard to providing an opportunity for the presentation of the parties' views.

#### §1108.5 Fees and costs.

(a) Fees will be utilized to defray the costs of the STB in administering this alternate dispute resolution program in accordance with 31 U.S.C. 9701. The fees for filing a complaint, answer, third party complaint, third party answer, appeals of arbitration decisions, and petitions to modify or vacate an arbitration award will be as set forth in 49 CFR 1002.2(f)(87). All fees are non-refundable except as specifically provided and are due with the paying party's first filing in any proceeding.

(b) The parties may agree among themselves who will bear the expenses of arbitration, including compensation of the arbitrator. Absent an agreement, each party will bear its own expenses, including, without limitation, fees of experts or counsel. Absent an agreement, the fees of the Arbitrator will be paid by the party or parties losing an arbitration entirely. If no party loses an arbitration entirely (as determined by the Arbitrator), the parties shall share equally (or pro rata if more than

two parties) the fees and expenses, if any, of the Arbitrator, absent an agreement otherwise.

#### §1108.6 Arbitrators.

(a) Arbitration shall be conducted by an arbitrator (or panel of arbitrators) selected, as provided herein, from a roster of persons (other than active government officials) experienced in rail transportation or economic issues similar to those capable of arising before the STB. The initial roster of arbitrators shall be established by the RSTAC in consultation with the Chairman of the STB, and shall contain not fewer than 21 names. The roster shall thereafter be maintained by the Chairman of the STB, who may augment the roster at any time to include other eligible arbitrators and may remove from the roster any arbitrators who are no longer available. The initial roster shall be published; thereafter the roster shall be available to the public, upon request, at all times. For each arbitrator on the roster, the roster shall disclose the level of the fee (or fee range) charged by that arbitrator.

(b) The parties to a dispute may select an arbitrator (or panel of arbitrators) and submit the name(s) (and, if not already on the roster of arbitrators, the qualifications) of the agreed-upon person(s) in writing to the Chairman of the STB. Any person(s) so designated who is not already on the roster, if found to be qualified, will be added to the roster and may be used as the arbitrator(s) for that dispute.

(c) If the parties cannot agree upon an arbitrator (or panel of arbitrators), then each party shall, using the roster of arbitrators, strike through the names of any arbitrators to whom they object, number the remaining arbitrators on the list in order of preference, and submit its marked roster to the Chairman of the STB. The Chairman will then designate the arbitrator (or panel of arbitrators, if mutually preferred by the parties) in order of the highest combined ranking of all of the parties to the arbitration.

(d) The process of selecting an Arbitrator pursuant to this section shall be conducted confidentially following the

completion of the Arbitration Commencement Procedures set forth in §1108.7 hereof.

(e) If, at any time during the arbitration process, a selected Arbitrator becomes incapacitated, unwilling or unable to fulfill his/her duties, or if both parties agree that the arbitrator should be replaced, a replacement Arbitrator will be promptly selected under the process set forth in paragraphs (b) and (c) of this section.

**§1108.7 Arbitration commencement procedures.**

(a) Each demand for arbitration shall be commenced with a written complaint. Because arbitration under these procedures is both voluntary and binding, the complaint must set forth in detail: the nature of the dispute; the statutory basis of STB jurisdiction; a clear, separate statement of each issue as to which arbitration is sought; and the specific relief sought. Each complaint shall contain a sworn, notarized verification, by a responsible official of the complaining party, that the factual allegations contained in the complaint are true and accurate. Each complaint must contain a statement that the complainant is willing to arbitrate pursuant to these arbitration rules and be bound by the result thereof in accordance with those rules, and must contain a demand that the defendants likewise agree to arbitrate and be so bound.

(b) The complaining party shall serve, by overnight mail or hand delivery, a signed and dated original of the complaint on each defendant (on a responsible official at his or her usual place of business), and an original and two copies on the STB, accompanied by the filing fee prescribed under §1108.5(a) and set forth in 49 CFR 1002.2(f)(87). Each complaint served on a defendant shall be accompanied by a copy of this part 1108.

(c) Any defendant willing to enter into arbitration under these rules must, within 30 days of the date of a complaint, answer the complaint in writing. The answer must contain a statement that the defendant is willing to arbitrate each arbitration issue set forth in the complaint or specify which such issues the defendant is willing to

arbitrate. If the answer contains an agreement to arbitrate some but not all of the arbitration issues in the complaint, the complainant will have 10 days from the date of the answer to advise the defendant and the STB in writing whether the complainant is willing to arbitrate on that basis. Upon the agreement of the parties to arbitrate, these rules will be deemed incorporated by reference into the arbitration agreement.

(d) The answer of a party willing to arbitrate shall also contain that party's specific admissions or denials of each factual allegation contained in the complaint, affirmative defenses, and any counterclaims or set-offs which the defendant wishes to assert against the complainant. The right of a defendant to advance any counterclaims or set-offs, and the capacity of an Arbitrator to entertain and render an award with respect thereto, is subject to the same jurisdictional limits as govern the complaint.

(e) A defendant's answer must be served on the complainant, other parties, and the STB in the same manner as the complaint.

(f) A defendant willing to enter into arbitration under these procedures only if it is able to obtain cross-relief against another defendant or a non-party may serve an answer containing an agreement to arbitrate that is conditioned upon the willingness of any such third party to enter into arbitration as a third party defendant. Simultaneously with the service of any such conditional answer, the defendant making such answer shall serve a complaint and demand for arbitration on the party whose presence that defendant deems to be essential, such complaint and demand to be drawn and served in the same manner as provided in paragraphs (a) and (b) of this section. A defendant receiving such a complaint and demand for arbitration and that is willing to so arbitrate shall respond in the same manner as provided in paragraphs (c), (d), and (e) of this section.

(g) Upon receipt of a complaint and demand for arbitration served by a complainant on a defendant, or by a defendant on a third-party defendant, the STB promptly will notify the parties

serving and receiving such documents of any patent deficiencies, jurisdictional or otherwise, which the STB deems fatal to the processing of the complaint, and will suspend the timetable for processing the arbitration until further notice. If the complainant is unwilling or unable to remedy such deficiencies to the satisfaction of the STB within such time as the STB may specify, the complaint shall be deemed to be withdrawn without prejudice. Upon satisfaction that two or more parties have unconditionally agreed to arbitrate under these procedures, the STB will so notify the parties and commence procedures for the selection of an Arbitrator.

(h) An agreement to arbitrate pursuant to these rules will be deemed a contract to arbitrate, subject to limited review by the STB pursuant to §1108.11(c), for the purpose of subjecting the arbitration award to the provisions of 9 U.S.C. 9 (court enforcement of an arbitration award), and 9 U.S.C. 10 (vacation of an arbitration award by a court on certain limited grounds).

#### §1108.8 Arbitration procedures.

(a) The Arbitrator will establish rules, including timetables, for each arbitration proceeding.

(1) The evidentiary process will be completed within 90 days from the start date established by the arbitrator, and the arbitrator's decision will be issued within 30 days from the close of the record. The parties may agree to vary these timetables, however, subject to the approval of the arbitrator. Matters handled through arbitration under these rules are exempted from any applicable statutory time limits, pursuant to 49 U.S.C. 10502.

(2) Discovery will be available only upon the agreement of the parties.

(b) Evidence will be submitted under oath. Evidence may be submitted in writing or orally, at the direction of the Arbitrator. Hearings for the purpose of cross-examining witnesses will be permitted at the sound discretion of the Arbitrator. The Arbitrator, at his/her discretion, may require additional evidence.

(c) Subject to alteration by the Arbitrator or by agreement of the parties in individual proceedings, as a general

rule, where evidence is submitted in written form, the complaining party will proceed first, and the defendant will proceed next. The complainant will then be given an opportunity to submit a reply. At the discretion of the Arbitrator, argument may be submitted with each evidentiary filing or in the form of a brief after the submission of all evidence. Page limits will be set by each Arbitrator for all written submissions of other than an evidentiary nature.

(d) Any written document, such as a common carrier rate schedule, upon which a party relies should be submitted as part of that party's proof, in whole or in relevant part. The Arbitrator will not be bound by formal rules of evidence, but will avoid basing a decision entirely or largely on unreliable proof.

(e) Where proof submitted to an Arbitrator addresses railroad costs, such proof should be prepared in accordance with the standards employed by the STB in ascertaining the costs at issue. Discovery should be sufficient to enable parties to meet these standards.

(f) Where the Arbitrator is advised that any party to an arbitration proceeding wishes to keep matters relating to the arbitration confidential, the Arbitrator shall take such measures as are reasonably necessary to ensure that such matters are treated confidentially by the parties or their representatives and are not disclosed by the Arbitrator to non-authorized persons. If the Arbitrator regards any confidential submission as being essential to his/her written decision, such information may be considered in the decision, but the Arbitrator will make every effort to omit confidential information from his/her written decision.

#### §1108.9 Decisions.

(a) Decisions of the Arbitrator shall be in writing and shall contain findings of fact and conclusions. All such decisions shall be served by the Arbitrator by hand delivery or overnight mail on the parties. At the same time, the arbitrator shall notify the STB, in writing, that a decision has been rendered.

(b) By agreeing to arbitrate pursuant to these procedures, each party agrees

## §1108.10

that the decision and award of the Arbitrator shall be binding and judicially enforceable in law and equity in any court of appropriate jurisdiction, subject to a limited right of appeal to the STB as provided below.

### §1108.10 Precedent.

Decisions rendered by arbitrators pursuant to these procedures shall have no precedential value.

### §1108.11 Enforcement and appeals.

(a) An arbitration decision rendered pursuant to these procedures may be appealed to the STB within 20 days of service of such decision. Any such appeal shall be served by hand delivery or overnight mail on the parties and on the STB, together with a copy of the arbitration decision. Replies to such appeals may be filed within 20 days of the filing of the appeal with the Board. An appeal or a reply under this paragraph shall not exceed 20 pages in length. The parties shall furnish to the STB an original and 10 copies of appeals and replies filed pursuant to this section. The filing fee for an appeal will be as set forth in 49 CFR 1002.2(f)(87).

(b) The filing of an appeal, as allowed in paragraph (a) of this §1108.11, automatically will stay an arbitration decision pending disposition of the appeal. The STB will decide any such appeal within 50 days after the appeal is filed. Such decision by the STB shall be served in accordance with normal STB service procedures.

(c) The STB will review, and may vacate or amend, an arbitration award, in whole or in part, only on the grounds that such award:

(1) Exceeds the STB's statutory jurisdiction; or

(2) Does not take its essence from the Interstate Commerce Act.

(d) Effective arbitration decisions rendered pursuant to these procedures, whether or not appealed to the STB, may only be enforced in accordance with 9 U.S.C. 9 and vacated by a court in accordance with 9 U.S.C. 10, except that an STB decision vacating an arbitration award is reviewable under the Hobbs Act, 28 U.S.C. 2321, 2342.

## 49 CFR Ch. X (10-1-03 Edition)

### §1108.12 Additional matters.

Where an arbitration demand is filed by one or more complainants against one or more defendants, the complainants as a group and the defendants as a group shall be entitled to exercise those rights, with respect to the selection of arbitrators, as are conferred on individual arbitration parties.

## PART 1109—USE OF ALTERNATIVE DISPUTE RESOLUTION IN BOARD PROCEEDINGS AND THOSE IN WHICH THE BOARD IS A PARTY

### Sec.

1109.1 Invoking ADR in Board proceedings.

1109.2 Appeals from arbitration decisions.

1109.3 Confidentiality in ADR matters.

1109.4 Mandatory mediation in rate cases to be considered under the stand-alone cost methodology.

AUTHORITY: 5 U.S.C. 571 *et seq.*

SOURCE: 57 FR 32451, July 22, 1992, unless otherwise noted.

### §1109.1 Invoking ADR in Board proceedings.

Any proceeding may be held in abeyance for 90 days while administrative dispute resolution (ADR) procedures (such as arbitration and mediation) are pursued. (Additional 90 day periods can be requested.) The period while any proceeding is held in abeyance to facilitate ADR will not be counted towards the statutory deadlines. All parties are required to indicate their written consent for ADR treatment. Requests that a proceeding be held in abeyance while ADR procedures are pursued should be submitted to the Office of the Secretary. The Secretary shall promptly issue an order in response to such requests. Unless arbitration or some other binding process involving a neutral has been undertaken, any party believing that ADR procedures are not yielding the intended results shall inform the Secretary and all parties in writing, and normal agency procedures will be reactivated by the Secretary by notice served on all the parties.

**CERTIFICATE OF SERVICE**

I hereby certify that on November 10, 2004, I served the foregoing document, Complaint  
To Commence Arbitration Under 49 C.F.R. Part 1108.7(a), on Richard E. Weicher, Vice  
President and Senior Regulatory Counsel, The Burlington Northern and Santa Fe Railway  
Company, 2500 Lou Menk Drive, Fort Worth, TX 76131, by UPS overnight mail.

*Thomas F. McFarland*

---

Thomas F. McFarland